Supreme Court, U.S.
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No. 04-
JUL 11 2005
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IN THE

Supreme Court of the United States

JOE ALFRED IZEN, JR. AND KAREN SUTER IZEN,

Petitioners,

v.

TERRANCE CATALINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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JULY 2005

QUESTION PRESENTED

Whether a plaintiff asserting a *Bivens* claim of retaliatory prosecution under the First Amendment must prove that law enforcement agents lacked probable cause to pursue the prosecution.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case that Petitioner cannot maintain a *Bivens* action for retaliatory prosecution in violation of the First Amendment because Respondent had probable cause to pursue an investigation.

OPINIONS BELOW

The opinion of the court of appeals on rehearing, App., *infra*, 1a, is reported at 398 F.3d 363. The original panel opinion of the court of appeals, App., *infra*, 12a, is reported at 382 F.3d 566. The opinion of the district court, App., *infra*, 25a, is reported at 251 F. Supp. 2d 1327. A prior opinion of the court of appeals, App., *infra*, 61a, is reported at 256 F.3d 324.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2005. App., *infra*, 1a. Petitioner's request for rehearing en banc was denied April 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT OF THE CASE

This case presents an important and recurring question on which the federal courts of appeals are divided: Whether federal officers who use the prosecutorial function to silence speech escape liability under *Bivens* if there was probable cause to pursue the prosecution. The Court has granted review in a case

presenting this very question. *See Hartman* v. *Moore*, No. 04-1475, *cert. granted*, 554 U.S. ___ (June 27, 2005). *Hartman* presents the question "[w]hether law enforcement agents may be liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for retaliatory prosecution in violation of the First Amendment when the prosecution was supported by probable cause."

1. Izen's Representation of Tax Defendants. Petitioner Joe Izen is a tax attorney who has successfully represented taxpayers for more than twenty years. In the course of his career, Petitioner has won numerous battles against the IRS. *E.g.*, *Dixon* v. *Comm'r*, 316 F.3d 1041 (9th Cir. 2003) (vacating tax court decision upholding deficiencies because IRS committed fraud on the court); *United States* v. *Troescher*, 99 F.3d 933 (9th Cir. 1996) (applying Fifth Amendment right against self-incrimination to tax cases); *United States* v. *Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983) (reversing convictions of tax shelter promoters for lack of intent because legality of program was unsettled); *Cochran* v. *Comm'r*, 56 T.C.M. (CCH) 1433 (T.C. 1989) (declining to find taxpayer committed fraud or negligence by participating in trusts because a "reasonable person would have believed that the ALA plan offered an opportunity for legitimate tax savings").

2. Respondent's Investigation and Prosecution of Petitioner. In August 1989, Respondent, an IRS agent, received a referral containing an informant's allegations that Petitioner had not filed income tax returns for 1986, 1987, and 1988, and that Petitioner was involved in money laundering. App., *infra*, 2a. Respondent soon determined that the informant was not reliable, and that there was an insufficient basis to investigate Petitioner for money laundering. *Id.* at 2a-3a. Respondent nevertheless recommended opening a criminal investigation into Petitioner's missing tax

returns in October 1989. *Id.* at 3a. Respondent also recommended that Petitioner be investigated for failing to file a return for 1985, even though Petitioner had filed a return for that year. *Id.* Petitioner's 1986 return was filed a month before Respondent's recommendation that he be investigated for failing to file that return. *Id.* Unaware of the criminal investigation, Petitioner soon filed his 1987 and 1988 returns, which showed he was owed refunds for both years. Respondent subsequently approved refunds to Petitioner for the years 1986, 1987, and 1988 and ended the investigation. *Id.*

Despite having previously determined that there was no basis upon which to investigate Petitioner for money laundering, Respondent proceeded to launch a money laundering investigation. IRS investigative reports written and reviewed by Respondent show that Petitioner's representation of tax clients and his association with tax protestors were prominently mentioned as reasons to investigate Petitioner. *Id.*

Respondent arranged a "sting" operation, in which another agent, James Climer, posed as a businessman with hundreds of thousands of dollars from the sale of stolen oil. *Id.* at 3a. Climer sought Petitioner's advice for his "tax problem." Respondent taped conversations between Petitioner and Climer, in which Petitioner unequivocally advised Climer to report the illegal income on his personal and partnership income tax returns.

Petitioner also told Climer, correctly, that he and his partner could establish a foreign trust, exchange their assets for beneficial interest certificates, and legitimately borrow funds from the trust, so long as they paid interest on the loans, repaid the loans, and the trust reported and paid taxes on the interest income in the United States.

Respondent's investigation lasted from 1990 to 1992. In 1994, Petitioner won a significant case against the IRS in which the agency was found to have committed

fraud on the court by attempting to fix a "test case" regarding certain tax shelters and by bribing witnesses. *DuFresne* v. *Comm'r*, 26 F.3d 105, 107 (9th Cir. 1994). Soon thereafter, in May, 1995, Respondent testified before the grand jury that eventually indicted Petitioner. When asked why he targeted Petitioner, Respondent stated that "he's legal counsel as far as trusts and things," and that "he's saying, you know, these trusts are legal, they are valid. He is writing legal opinions that people are relying on to, in turn, use these trusts." *Id.* at 35a n.8. The grand jury returned a four-count indictment for conspiracy, attempt, and aiding and abetting money laundering but did not indict Petitioner on any tax charges.

Petitioner opposed the charges against him. A year later, the United States moved to withdraw the presentment of the indictment and all criminal charges against Petitioner were dropped. *Id.* at 4a.

3. Respondent's Improper Retaliatory Motive. As the original panel opinion below noted, Respondent "was well aware of Izen's representation of criminal tax defendants" when he initiated the money laundering investigation. *Id.* at 21a. Numerous documents show that Petitioner's representation of tax clients figured prominently in Respondent's decisions to investigate and prosecute him, while none of them indicated that Petitioner had engaged in money laundering.

For example, the case analysis Respondent submitted in October, 1989 noted that Petitioner "is an attorney who specializes in representing tax protesters," and that he "has represented several protestors in the Houston areas and all across the country. He is very well known in the tax protest movement." *Id.* (quoting record excerpts). Further, Respondent specifically cited Petitioner's successful representation of tax clients when he later requested permission to conduct an undercover

sting operation: "Izen is very well known throughout the country. He has represented tax protesters from the East coast to the West coast. Izen represented Dahlstrom before the Ninth Circuit. Dahlstroms's conviction was reversed. The case had to do with a foreign trust scheme devised to create sham tax deductions." *Id.* The panel noted that "much of the information Catalina relates about Izen pertains to his representation of clients in his professional capacity." *Id.* at 21a. Nevertheless, "Catalina concludes that 'Izen's actions demonstrate that he has very little regard for the tax laws and is predisposed to launder money.'" *Id.* (quoting record excerpts).

A "Case Summary" from December 1989 contained the following "Allegations" against Petitioner: "Izen is a well known tax protestor attorney in the Houston area. He files personal returns on an irregular basis, and they are always filed late. He was head of the legal dept. for Nassau Life Insurance, a tax shelter in the Bahama Islands. He had close ties to the Center for Independence for Judges and Lawyers . . . ." *Id.* at 21a (quoting record excerpts).

The panel's opinion further noted that nothing in the "primary sources of information Catalina relied on . . . connects Izen to money laundering." *Id.* at 22a. A 1986 Summary Report concerning Nassau Life Insurance details a tax shelter, along with various individuals and groups associated with the originator of the shelter, but "none is accused in the report of laundering money." *Id.* Petitioner is only mentioned once: "Izen is an attorney out of Houston, Texas. He has issued tax opinions for Nassau Life. According to intelligence that we have acquired, Izen has been representing Nassau Life since June 1983. IRS discontinued an investigation of Izen in April 1984." *Id.* at 22a. The panel thus concluded that "both the reports prepared by Catalina and those he reviewed prominently refer to Izen's associations with

unpopular targets of the IRS, but contain scant, if any, evidence of money laundering, the purported purpose of the investigation." *Id.* at 24a.

Respondent's testimony before the grand jury provides further evidence of his retaliatory animus against Petitioner. Respondent testified that Petitioner was targeted because of the advice he was giving tax clients. *Id.* at 34a-35a n.8. Respondent's investigation and prosecution of Petitioner were designed to retaliate against Petitioner for his successful and effective representation of tax defendants over the course of his career.

4. **Petitioner's Lawsuit.** In 1997, Petitioner filed suit against Respondent, Agent Climer, and the United States. Petitioner asserted, *inter alia*, that the defendants violated his First Amendment right to be free from prosecution in retaliation for representing tax defendants and that defendants violated his Fourth Amendment right to be free from malicious prosecution. The district court dismissed all of Petitioner's claims, but the Fifth Circuit reversed as to Petitioner's First Amendment retaliation claim and his Fourth Amendment malicious prosecution claim. *Id.* at 61a-70a. The court held that the district court had "misconstrued the applicable law on both." *Id.* at 4a. With regard to the retaliatory prosecution claim, the court held that "neither the district court nor the IRS agents explain the connection between Izen's late filing of tax returns and the agents' decision to begin an undercover sting operation to investigate possible money laundering through offshore trusts." *Id.* at 67a.

On remand, the district court again granted summary judgment in favor of the defendants on all of Petitioner's claims. Petitioner once more appealed to the Fifth Circuit. The panel issued a decision in which it affirmed the dismissal of Petitioner's Fourth Amendment